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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ROCKY ORTEGA, Plaintiff and Appellant, v. A. STEPHEN CORVI, Defendant and Respondent.	B289510 (Los Angeles County Super. Ct. No. BC610320)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michelle W. Court, Judge. Affirmed.

Rocky Ortega, in pro. per., for Plaintiff and Appellant.

Martin D. Gross, Santa Monica, for Defendant and Respondent.

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A lawyer sued his former clients for his share of a contingency fee set forth in a written contract. Ruling on a motion in limine, the trial court excluded the contract from evidence after concluding that the client's signature had been forged. Following a bench trial, the court ruled in the clients' favor. The lawyer appeals on the ground that the trial court erred in allowing the clients to call a different handwriting expert in support of their motion in limine than they had originally designated. We conclude that the lawyer has not carried his burden of showing any error, and accordingly affirm.

FACTS AND PROCEDURAL BACKGROUND[1]

I. Facts

In 2010, A. Stephen Corvi (Corvi), Fractions Sportswear Inc., and 20th Century Funding, Inc. (collectively, defendants) hired Rocky Ortega (Ortega), a lawyer, to represent them in a lawsuit they brought against Second Baptist Church, Canaan Housing Corporation and Quantum. The matter went to trial against Second Baptist Church, defendants lost, and the court assessed Corvi $94,000 in attorney fees and costs. At that point, Ortega told Corvi he was "done with the case" and left Corvi's case file out in his driveway for Corvi to retrieve. Corvi eventually entered into a stipulated judgment against Caanan Housing Corporation and Quantum, and with the assistance of a new lawyer, managed to collect $252,297.01 on that judgment from the surplus of foreclosure sales of property owned by those entities. Corvi did not share any of these proceeds with Ortega.

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1 We have cobbled together the facts and procedural background as best we could from the snippets of the record supplied by the parties.

II. Procedural Background

In February 2016, Ortega sued defendants for breach of contract, anticipatory breach of contract, constructive trust and assignment of judgment—all stemming from their alleged failure to pay Ortega 40 percent of the recovered judgment. In support of his complaint, Ortega eventually produced a written Legal Services Agreement (Agreement), pursuant to which Corvi (and Corvi alone) promised Ortega a 40 percent contingency fee of any recovery (other than on a specified note) in a lawsuit Corvi was bringing against Second Baptist Church and the Canaan Housing Corporation. The Agreement purported to be signed by Corvi.

Prior to trial, Corvi moved to exclude the Agreement on the ground that Corvi never signed it and his signature was forged. In his motion, Corvi indicated he would ask the trial court to compare the signatures and would also call Bart Baggett as a "handwriting expert."

In January 2018, the trial court heard Corvi's motion in limine. In support of his motion, Corvi called Beth Crismann as a handwriting expert, not Bart Baggett. The court granted the motion, and excluded the Agreement from evidence.

The matter immediately proceeded to a bench trial in light of both parties' waiver of a jury. Ortega called four witnesses in his case in chief. The court granted a nonsuit to defendants on the ground that Ortega's request for fees on the basis of an *oral* contingency fee agreement was time barred and that Ortega was not otherwise entitled to remuneration under quantum meruit. The court thereafter entered judgment in defendants' favor.[2]

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2 The trial court generally awarded costs to defendants, but the sentences subsequently interlineated to award specific costs awarded them to entities who are not parties to this litigation.

Ortega filed a timely notice of appeal.

DISCUSSION

Ortega argues that the trial court erred in allowing Corvi to call Chrismann as a handwriting expert witness when Corvi initially designated a different handwriting expert witness.

The Civil Discovery Act (Code Civ. Proc. § 2034 et seq.)[3] regulates the disclosure of information regarding "expert trial witnesses." (§ 2034.210.) Once a trial date is set, a party has the statutory right to "demand a mutual and simultaneous exchange" of the names of all persons "whose oral or deposition testimony in the form of an expert opinion any party expects to offer in evidence at trial." (*Ibid.*; § 2034.230 [requiring that demand be in writing]; accord, *Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal.5th 536, 538 [so noting].) If a party subsequently wishes to amend the previously disclosed list of expert witnesses, he must seek leave of the court to do so. (§§ 2034.610, 2034.620.) If, at the time of trial, an expert is *not* disclosed, the trial court "shall exclude" the expert's testimony from evidence if (1) the failure to disclose is "unreasonabl[e]," (2) a party objects, and (3) the objecting party has itself complied with the rules governing disclosure of expert witnesses. (§ 2034.300; *Tesoro del Valle Master Homeowners Assn. v. Griffin* (2011) 200 Cal.App.4th 619, 641; *Richaud v. Jennings* (1993) 16 Cal.App.4th 81, 92.)

Ortega's appeal rests on the premise that the Civil Discovery Act applies here, but this is a tenuous premise. By its plain text, the Act applies to "expert *trial* witnesses." Here, the

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Corvi points out this discrepancy, but does not ask us to correct it.

3 All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

expert handwriting witnesses testified solely in support of Corvi's motion in limine, and *not* at the trial itself.

Even if we assume that the Act applies, Ortega's argument still fails for three independent reasons. First, Ortega has not established that he ever demanded the mutual exchange of expert witnesses. Absent such proof and contrary to Ortega's contention that the designation of an expert witness somehow cures the other party's failure to demand disclosure, he cannot now complain that Corvi called a witness not on his original list. (*Hirano v. Hirano* (2007) 158 Cal.App.4th 1, 6 ["[W]here no demand is made by any party, no party is required to comply with the statutory exchange requirements."].) Second, Ortega has not established that he ever objected to Corvi's substitution of a different handwriting expert. At oral argument, Ortega represented that he had objected but also acknowledged that his representation could not fill a void in the record and the record here contains no objection. Absent proof in the record of an objection, Ortega cannot now seek to bar the expert's testimony. (§ 2034.300 [requiring "objection"]; *Richaud*, *supra*, 16 Cal.App.4th at p. 92 [same].) Lastly, Ortega has not established that the trial court abused its discretion in excusing Corvi from any failure to properly designate his handwriting expert or that Ortega was prejudiced by that ruling. Absent proof of an abuse of discretion or a resulting "[in]ability to respond to the new testimony," Ortega is not entitled to any relief on appeal. (*Dickison v. Howen* (1990) 220 Cal.App.3d 1471, 1476 ["The decision to grant relief from the failure to designate an expert witness is addressed to the sound discretion of the trial court"]; *id.* at p. 1479 ["the determination of prejudice . . . turn[s] on the party's ability to respond to the new testimony"].)

As the appellant, Ortega bears the burden of "affirmatively . . . show[ing] error" and that any "error is prejudicial." (*Vaughn*

v. Jonas (1948) 31 Cal.2d 586, 601.) Part of this burden entails "provid[ing] an adequate record to assess error" and prejudice. (*Nielsen v. Gibons* (2009) 178 Cal.App.4th 318, 324, citing *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140-1141.) By providing only bits and pieces of the record below, Ortega has not carried his burden of showing that he ever demanded the exchange of expert witness information, that he objected when Corvi substituted a different expert witness, or that the trial court abused its discretion to Ortega's prejudice in allowing the substituted expert witness to testify. As a consequence, Ortega has not rebutted the presumption that the trial court's judgment is correct (see *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564), and we must accordingly affirm.[4]

Ortega alternatively cites Corvi's violation of the trial judge's order setting forth the judge's "local local" rules. Those rules require advance disclosure of expert trial witnesses on pain of exclusion. By its terms, however, the order does not apply its exclusionary rule to witnesses used solely for a motion in limine and, in fact, the order separately discusses motions in limine. What is more, Ortega's construction of the order would do away with the Civil Discovery Act's requirement of a demand, but it is well settled that local local rules cannot differ from statutory law. (*Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1351, superseded on other grounds, Fam. Code, § 217.)

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4 Ortega's briefs on appeal only address Corvi, not the other two defendants. He has not included his notice of appeal in the record, so we cannot ascertain whether that notice reached the other two defendants. This uncertainty is of no moment, however, because our analysis of the merits of Ortega's appeal applies with equal force to all three defendants.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
CHAVEZ